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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM A. ANDERSON,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether the Georgia court properly concluded that none of Petitioner's rights were violated by a question which was never answered relating to an alleged statement by the Petitioner.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

On January 19, 1979, Petitioner,

William A. Anderson, and Forrest M. Squires,

were indicted by the Superior Court of Richmond County, Georgia. Both defendants were charged with two counts of violation of the Georgia Controlled Substances Act in that they did unlawfully sell marijuana on two separate occasions to Johnny Smith. (R. 4).

Defendant Squires subsequently entered a plea of guilty to the charges. On May 1, 1979, Petitioner received a jury trial on both counts. The jury returned a verdict of guilty on both counts on May 3, 1979. Petitioner was sentenced on May 9, 1979, to ten years on each count to run concurrently, with the first five years of said sentences to be served in the Georgia prison system and the remaining five years to be served on probation. (R. 26).

Petitioner subsequently appealed his convictions to the Court of Appeals of Georgia. Petitioner's main allegation on appeal related to a question by the prosecution on cross examination of the Petitioner. Petitioner asserted that this question violated his rights under Doyle v. Ohio, 426 U.S. 610 (1976); Miranda v. Arizona, 384 U.S. 436 (1966); and Jackson v. Denno, 378 U.S. 368 (1964). The Georgia Court of Appeals determined that the trial court did not abuse its discretion in denying the Motion for Mistrial and that Petitioner's rights had not been violated. The court thus affirmed Petitioner's conviction on February 15, 1980. Anderson v. State, 153 Ga. App. 841, __ S.E.2d __ (1980).

Pursuant to Petitioner's Motion for Rehearing, the Court of Appeals rewrote its opinion, again affirming the conviction. The Supreme Court of Georgia denied the Petition for Certiorari on June 19, 1980. The Supreme Court of Georgia also denied Petitioner's Motion for Reconsideration on July 15, 1980.

Further facts will be developed as necessary for a more thorough consideration of the issue raised by the present petition.

PART TWO

REASON FOR NOT GRANTING THE WRIT

A. THE GEORGIA COURT OF APPEALS PROPERLY DETERMINED THAT THE PETITIONER'S CONSTITUTIONAL RIGHTS HAD NOT BEEN VIOLATED BY AN UNANSWERED QUESTION FROM THE PROSECUTION RELATING TO AN ALLEGED STATEMENT MADE BY THE PETITIONER.

At Petitioner's trial, the State presented evidence showing Petitioner's involvement in sales of marijuana on two separate occasions. The State's case was supported by various tape recordings made of conversations the Petitioner had with Charles Smith and John Smith. No evidence

was introduced by the State of any statement made by the Petitioner as the State had no reason to believe that Petitioner would admit to the tape recordings and then assert a defense of entrapment. Up until the time of Petitioner's taking the stand, any statements from the Petitioner denying his commission in the crimes would have had no probative value.

After the State concluded its case, the Petitioner took the stand and admitted being the individual on the tape recordings. He further admitted his participation in the transactions to a limited degree. The Petitioner asserted that he was entrapped by law enforcement officials in participating in the drug transactions. On cross-examination, the prosecution attempted to discredit

Petitioner's entrapment defense. The prosecution asked the following question: "Let me ask you this, you denied these transactions when Lieutenant Sanders arrested you there in Forrest Squires' apartment, didn't you?" (T. 261). Counsel for the Petitioner immediately objected before an answer was given. The jury was sent out and Petitioner's counsel moved for a mistrial based on Doyle v. Ohio and Jackson v. Denno. Petitioner's counsel specifically asked that the court grant a mistrial. (T. 262). In response to the objection, the prosecution stated as follows:

> "Your Honor, in this particular case, the question was asked, the statement was not made. In addition, the State expects

the evidence to show that he did not try to assert his Fifth Amendment rights in any way, but merely told the Investigator Sanders, 'I didn't do it; there's nothing to this, it's all political'. That is totally inconsistent and not in response to interrogation so that Miranda would play any part in it. It is inconsistent with the position he has now taken under oath before this jury whether Miranda was involved - and it is not because it is not in response to interrogation

of any sort - even if Miranda were involved under Harris v. New York we are allowed to bring that in even if Miranda were involved and the Miranda rights had not been given. Under Harris v. New York we are allowed to bring in the inconsistency there and that is all we are attempting to do, to show that his position in court today and what he said from the stand is inconsistent with the statement he made immediately upon his arrest, not in response to interrogation."

(T. 262-263). Counsel for the Petitioner

argued that this particular situation was distinguishable from Harris v. New York, 401 U.S. 222 (1971), cited by the prosecution. Petitioner's counsel then asserted that there had been no statement introduced into evidence and that if any such statement were going to be introduced, a Jackson v. Denno hearing would be required.

After listening to arguments by counsel, the trial court ruled as follows: "I overrule the motion for a mistrial. I am going to instruct counsel not to pursue that line of interrogation any further and I am going to instruct the jury to disregard the question." (T. 264). When the jury returned to the courtroom, the court instructed them as follows:

"Ladies and Gentlemen of the jury, I instruct you to disregard any question asked the witness about the statement that he purportedly made to Investigator Sanders and any answer which he started to give and I instruct counsel not to pursue that line of questioning any further."

(T. 265). Thus, no answer was ever given to the question, no statements were introduced that were allegedly made by the Petitioner and the jury was instructed to disregard any such line of questioning.

Petitioner raised this point as error in his brief to the Georgia Court of Appeals as well as in this Petition for

Certiorari to the Supreme Court of Georgia. The Court of Appeals of Georgia found that no Jackson v. Denno hearing was required as the question was asked solely for the purpose of impeaching the Petitioner's exculpatory entrapment testimony. Anderson, supra. The court further refused to speculate as to Petitioner's position had he been forced to answer the question. The court noted that no response had been made and the jury was adequately instructed to disregard the question. The court found that in face of the compelling evidence introduced against the Petitioner, there was no abuse in discretion in denying the Motion for Mistrial.

Petitioner now asserts in this court as error, the ruling of the trial court and

the Court of Appeals of Georgia. Petitioner asserts that the rulings by these courts deny his rights under Doyle v. Ohio, supra, apparently claiming that this somehow commented on Petitioner's assertion of his Fifth Amendment rights. Petitioner further asserts that the Georgia courts misapplied this court's holding in Harris v. New York, supra. Petitioner finally asserts that the Georgia Court of Appeals has issued an opinion in direct conflict with an opinion by the Fifth Circuit Court of Appeals in Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968).

Although Petitioner asserts these as three separate reasons for granting the writ as they are all interrelated, Respondent will consolidate the points made by the Petitioner in his argument.

The present petition presents an issue not readily comparable to the prior decisions of this Court. Petitioner has asserted numerous cases which he claims would support a finding of a violation of his constitutional rights by the previously quoted question from the prosecution. The focal point of the examination of the present case should be the actual question which was asked and the subsequent response of the trial court.

Petitioner asserts in various portions of his brief that this question amounted to either a comment on Petitioner's silence or the improper introduction of a statement made by the Petitioner without a Jackson v. Denno hearing. As Petitioner has admitted, there was no evidence presented before the jury to show the Petitioner either made a statement or remained silent. The only reference in the record to explain whether Petitioner made such a statement is the

offer of proof made by the prosecution to the trial court. The district attorney asserted that the Petitioner made a statement denying his involvement in the drug transactions. (T. 263). The Petitioner did not assert at that time that he made no statement, nor did he confirm that he had made a statement. The trial court specifically directed the prosecution "not to pursue that line of interrogation any further." (T. 264). Clearly, this instruction from the trial court precluded the prosecution from producing any evidence before the jury of any statement which the Petitioner may have made. The court further instructed the jury to disregard any reference to any alleged statements. Thus, no comment was made in response to the prosecution's question.

Respondent submits that this is clearly no violation of the principles of Doyle v. Ohio, supra, as asserted by the Petitioner. In Doyle, this Court ruled that post-arrest silence in the wake of Miranda warnings is ambiguous and cannot be used at trial to impeach an exculpatory story told by a defendant. The facts in the case at bar are virtually the opposite from the facts in Doyle. In his testimony at trial, Petitioner admitted taking part in the various transactions and admitted that his voice was on the tapes played for the jury. The Petitioner merely asserted a defense of entrapment. The prosecution did not attempt to show that Petitioner had not made any statement to the authorities, but was showing that Petitioner had taken an inconsistent position prior to trial. That is, the

prosecution attempted to show that the Petitioner denied any participation in the drug transactions. This is clearly distinguishable from a case of showing an individual's silence. Silence is not necessarily inconsistent with an exculpatory story when that silence comes in the wake of Miranda warnings. However, a statement denying participation in the crime is clearly inconsistent with a statement at trial admitting participation in the crime, but asserting a defense of entrapment. Thus, there was no ambiguity involved as there was in Doyle.

Petitioner asserts that this Court should presume that he did not waive his right to remain silent upon arrest. No such presumption is required in light of the offer of proof made by the prosecution at trial. Petitioner made no attempt to show the Court that he made no statement.

This offer could have been made outside the presence of the jury and would have shown the trial court that the prosecution's question was an improper comment on Petitioner's silence. This would have avoided the problem that Petitioner continually classifies as a "Hobson's choice". Furthermore, the actions of the trial court resolved Petitioner's problem by clearly instructing the jury that they were precluded from considering any statement or lack thereof.

Petitioner goes on to assert in his brief that even if this Court assumes that he did not remain silent, the Court should find a violation of his Miranda rights and his rights under Jackson v. Denno . Petitioner refers this Court to a Fifth Circuit Court of Appeals decision which

he asserts as appropriate in this case. See Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968). In Breedlove, the district attorney referred to a part of the Defendant's statement that was not in evidence. The court found that it had to determine whether the dialogue at trial was sufficient use of the Defendant's confession to invoke the principles in Jackson v. Denno. The court noted that the reason for the rule requiring a determination of the voluntariness of the confession is that a defendant should not be convicted on the basis of his own confession of guilt unless there is a prior determination by the court that the confession was voluntary. Breedlove, supra at 1022. The case at bar is clearly distinguishable as the statements attempted to be introduced by the prosecution did not

amount to a confession at all, but were clearly designed to be exculpatory. Furthermore, the statements made by the Petitioner were never presented to the jury for their consideration. The only comment before the jury was the initial question by the prosecution, and the jury was clearly instructed to disregard that question.

Petitioner has asserted that the Georgia Court of Appeals' reliance on Harris v. New York, 401 U.S. 222 (1971), is misplaced. It should be noted that Harris was decided after the Fifth Circuit's decision in Breedlove v. Beto, supra. In Harris, this Court determined that statements could be used for impeachment of a defendant even though the statements were inadmissible under Miranda v. Arizona. Petitioner asserts

that there is still a requirement of a voluntariness hearing under Jackson v. Denno and asserts that the Georgia courts have incorrectly interpreted this Court's decision in Mincey v. Arizona, 437 U.S. 385 (1978). The Georgia Supreme Court has followed this Court's decision in Mincey as recently as Jones v. State, 243 Ga. 826, __ S.E.2d __ (1979), in which the court determined that when using statements for impeachment purposes, a showing of voluntariness must be made. There has been no assertion by the Petitioner that any statements made by him were involuntary. Rather, Petitioner has attempted to assert that the question by the prosecution was a comment on his silence. If Petitioner would have this Court presume that Petitioner remained silent, then there could clearly be no requirement for a voluntariness hearing.

Respondent submits that this Court should specifically note the surrounding facts and circumstances of this particular case. The question by the prosecution was not directed at Petitioner's silence, but was rather an attempt to impeach Petitioner's entrapment defense. No statement by the Petitioner was ever introduced before the jury, but was shown in an offer of proof by the prosecution to the court. As no statement was presented to the jury, there is no requirement for a Jackson v. Denno hearing. As the prosecution offered to show that there were statements, there is clearly no comment on Petitioner's silence. The instructions by the trial court clearly corrected any error that may have occurred by the question of the prosecution. Respondent submits that

this court should at most find harmless error by the statement of the district attorney. Under the standard of Chapman v. California, 386 U.S. 18 (1967), this Court can easily find that the question by the prosecution did not in any way contribute to the Petitioner's conviction. In light of the various tape recordings and testimony presented at trial, there is clearly overwhelming evidence of Petitioner's guilt.[1]

Thus, Respondent asserts that there have been no violations of Petitioner's constitutional rights by the single question asked by the prosecution that was not answered by

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1/ Both the Fifth and Sixth Circuit Courts of Appeals have found harmless error in Doyle v. Ohio situations. See Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977) and Meeks v. Havener, 545 F.2d 9 (6th Cir. 1976), cert. denied 433 U.S. 911 (1977).

the defendant. In light of the instructions of the trial court, the prosecution did not err in not presenting the statements by other testimony. Thus, Respondent submits that there have been no violations of Petitioner's federal constitutional rights.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the Petition for a Writ of Certiorari filed on behalf of the Petitioner, William A. Anderson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three (3) copies of same in the United States Mail with proper address and adequate postage:

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This 24 day of October, 1980.

JOHN C. WALDEN